No. 84-1097

IN THE

Supreme Court of the United States

October Term 1985

Supreme Court, U.S.
FILED
AUG 22 1985
JOSEPH F. ... JR.
CLERK

S. SIMCHA GOLDMAN,

Petitioner,

v.

THE SECRETARY OF DEFENSE, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

F. Tayton Dencer
Counsel of Record
John W. Whitehead
D. Kevin Ikenberry
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Wendell R. Bird
William P. Hollberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
First American Center
12th Floor
Nashville, Tennessee 37328

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

This case raises important issues concerning the scope of religious liberty in the military context. The military has

[1] Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

sought to compel Petitioner to violate his conscience as to a requirement of his religion in order to preserve absolute uniformity in matters of dress. The Rutherford Institute believes that this action dangerously undervalues religious liberty.

Although the government's interest in instilling reflexive obedience in members of the military, and its derivative interest in uniformity as a means to that end, are concededly significant, there must be limits to what the military may require in the name of obedience and uniformity. The court below reasoned that the government's interest in enforcement (of uniformity) for its own sake is sufficient to overbalance substantial religious liberty interests. Under that reasoning, the government's authority would be theoretically limitless. The Rutherford Institute believes that the free exercise clause of the First Amendment poses limits to the government's authority even in the military context.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including litigation involving the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion

Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

The government' argument for limited judicial review misconceives the rationale behind heightened judicial scrutiny. This Court's decisions establish that it is "the character of the right, not of the limitation, which determines what standard" of review should govern. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The right to free exercise of religion is a fundamental right. Accordingly, government regulations abridging it must be closely scrutinized to determine whether they are the least restrictive means of accomplishing a compelling state interest. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The deference due to the military because of its special competence in making military judgments does not require this Court to assume that the government's interest overbalances First Amendment interests or to forego analysis of whether the government has a less restrictive means at its disposal. It should not prevent this Court, therefore, from considering whether the government's interest in not granting Petitioner an exemption is compelling. Deference does not mean that military regulations abridging free exercise rights need not be justified, but only that the justifications proffered by the government be evaluated in light of the recognition that the courts have limited competence in making military judgments.

The government's argument that deference should take the form of lower scrutiny must, therefore, be construed to be an argument that its interest in all but the most extreme military regulations is so compelling that it can

never (or at least need not ever) tolerate any exemptions to accommodate religious freedom. It suggests a hypothetical balancing in which the government's interest in military governance is considered in light of the universe of First Amendment rights that might be burdened by its regulations, and the government's interest overbalances them all. This hypothetical balancing is inimical to the theory of balancing employed by this Court in free exercise cases which permits the government only a modicum of flexibility in restricting free exercise rights.

When a true balancing approach is applied, allowing for deference due to military judgments, it becomes apparent that the government's interest in not granting Petitioner an exemption is not even arguably legitimate, let alone compelling. The government's reasons for not granting Petitioner an exemption are merely reformulations of its general interest in uniformity. Analyzed at the margin, therefore, the government's interest in its regulation is not sufficient to overbalance Petitioner's religious liberty interest.

In evaluating the Petitioner's religious liberty interest, the court below exhibited the tendency of many lower courts to devalue religious liberty claims that relate to "conduct" rather than "belief." As this case illustrates, however, the belief/conduct distinction is misleading in that it relates imperfectly to what is evidently its purpose: To identify the core of freedom of conscience and to protect it absolutely. The compelled violation of religious faith at issue in this case trenches heavily upon freedom of conscience. This Court should refine the belief/conduct distinction to relate it more closely to freedom of conscience, or disavow it as constitutionally misleading.

ARGUMENT

I.

The Government's Suggestion That This Court Give Only Limited Judicial Review To Military Regulations Infringing Religious Liberty Dangerously Undervalues The Right To Free Exercise Of Religion, Unnecessarily Forecloses Meaningful Analysis Of The Government's Reasons For and Methods of Regulating Religious Liberty And Misplaces The Role Of Deference In Constitutional Analysis.

This Court's decisions require that government regulations abridging religious liberty receive strict scrutiny. Applying limited judicial review to instances of abridgment when they occur in the military context, as suggested by the government, not only lowers the standard by which the government's interest is assessed, but shifts the form of the analysis. In particular, it tends to preclude analysis of the government's interest at the margin. Deference to the military should not be construed to foreclose analysis; rather, it should lead this Court to evaluate specific claims made by the military that relate to matters of military expertise in light of this Court's limited competence in those areas.

A. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW MISCONCEIVES THE RATIONALE FOR HEIGHTENED JUDICIAL SCRUTINY.

1. This Court's Decisions Establish That Government Regulations Abridging Religious Liberty Must Be Closely Scrutinized To Determine Whether They Are The Least Restrictive Means Of Accomplishing A Compelling State Interest.

The special role played by fundamental rights in our constitutional scheme has led this Court to subject govern-

ment action abridging such rights to close scrutiny. *e.g., Plyler v. Doe*, 457 U.S. 202, 216-217 n. 15 (1982); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). It is now firmly established that only government regulations narrowly drawn, *e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), to achieve a compelling state interest, *e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), can withstand such scrutiny.Nowhere is this more clear than in this Court's decisions with respect to the rights associated with the free exercise clause. *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

The government's attempt to coerce petitioner to subordinate his religious convictions[2] to its dress code imposes a burden upon his religious liberty that is plainly within the compass of the free exercise clause. *Goldman v. Secretary of Defense*, 734 F.2d. 1531, 1537 (D.C. Cir. 1984). Under this Court's free exercise decisions, the government must justify its regulation by showing that "it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. at 718. The government seeks to

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[2] Petitioner has at all times since childhood worn a yarmulke. *Goldman v. Secretary of Defense*, 734 F.2d 1531, 1532 (D.C. Cir. 1984). He has done so, not out of a regard for custom or as a matter of discretion in the adoption of personal or cultural habits, but out of a profound commitment to his religion, located within the tradition of Orthodox Judaism, which requires him to wear it. As the District Court found, there is thus "no doubt that [petitioner's] insistence on wearing a yarmulke is motivated by his religious convictions . . ." *Goldman v. Secretary of Defense*, 530 F.Supp. 12, 16 (D.D.C. 1981).

elide that burden by adverting to the special role of the military in our system of government and to institutional reasons for allowing the military to operate free from judicial review of all but the most arbitrary and unreasonable actions. The government thus points to its special interest in the military as a rationale for limited judicial review. This rationale misconceives the logic behind heightened judicial scrutiny.[3]

2. Strict Scrutiny Is Appropriate, Regardless of the Military Context, Because the Standard of Review Depends Upon the Character of the Right and Not Upon the Nature of the Government's Reasons for Imposing Limitations Upon Its Exercise.

The degree of judicial scrutiny that is appropriate - strict in the case of fundamental rights - arises out of the nature of the right asserted. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It is the character of the right, not of the limitation, which determines what standard of choice governs."); *see. also., Plyler v. Doe*, 457 U.S. 202, 216-17 & n. 15 (1982). Indeed, the notion that the Constitution extends special protection to certain rights because they are fundamental to our system is simply another form of the proposition that the Constitution protects them from

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[3] As this Court has observed, "levels of 'scrutiny'. . . may all too readily become facile abstractions used to justify a result." *Rostker v. Goldberg*, 453 U.S. 57, 69-70 (1981). By predicating limited judicial review upon a theory of deference, the government deflects attention from, among other things, its lack of interest in not granting Petitioner an exemption and confuses the role of deference in constitutional analysis. It is nevertheless worthwhile to consider the flaws in the government's theory of judicial review because doing so exposes an analytically coherent way of reconciling the notion of deference to the military with First Amendment jurisprudence.

abridgement against all but special state interests. It follows from the special place of certain rights in our constitutional system that the government be required to show especially "good" reasons for any regulation that burdens their exercise. *See, e.g., Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (reasoning that certain types of interests, such as efficiency and convenience, are not enough to overbalance rights of free speech and press.)

Just how "good" a reason must be before it will justify abridgment of a right depends upon how important the right is.Thus, rights that are fundamental may be overbalanced only by a compelling state interest while certain other rights that find a less exalted, but still special, place in the constitutional hierarchy call for a substantial justification from the state. *Plyler v. Doe*, 457 U.S. at 230; *cf. H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (finding statute justified by important state interests.) In short, the logic behind heightened judicial scrutiny is that the degree of justification called for varies directly with the importance of the right. *See San Antonio School District v. Rodriguez*, 411 U.S. at 99, 102-103 (Marshall, J., dissenting) (variations in levels of scrutiny depend upon the constitutional and social importance of right burdened.)

In light of this logic, the government's point that it has special institutional interests at stake in governing the military might be offered to this Court for analysis as a possible compelling justification for the government's abridgment of Petitioner's religious liberty, but it is not responsive to the rationale for heightened judicial scrutiny, unless it can be taken as a claim that the right to religious exercise is not a fundamental right in the military.[4] Perhaps because this notion is so deeply troubling and has so little, if

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[4] Apart from such a construction, the government's argument seems to fall somewhere between a *non sequitur* and a tautology. The *non sequitur*

any, claim to constitutional authority, the government does not advance it directly.[5] The origins of the view that the right to religious exercise is a fundamental right may be traced to the origins of the country itself, for many of those who settled the colonies came to America to escape religious persecution. *See Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947). (reviewing history). The renascence of similar forms of persecution in early America "shocked the freedom-loving colonials into a feeling of abhorrence" and led to the 'conviction that individual religious liberty could be achieved best under a government stripped of all power to

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(footnote 4 continued)

is to argue special interests, which play the logical role of justifying limitations on a right, as a basis for treating the right as less important. The tautology appears when one recognizes that the government's argument against strict scrutiny is really an argument against the necessity of demonstrating a compelling interest and least restrictive means on a case-by-case basis. The government's argument then may be restated as follows: no compelling justification should be required to overbalance a burden on religious liberty because the government's interest in governing the military is compelling. As discussed below, this makes more sense if further refined to mean that no compelling justification should be required in *any particular case* because the government's interest in governing the military is, *in general*, so compelling that it overbalances all potential or hypothetical religious liberty interests. This hypothetical balancing is, however, inimical to the theory of balancing employed by this Court in its free exercise clause decisions.

[5] This Court's decisions upholding certain limitations on the exercise of constitutional rights have never intimated that the rights are somehow less important because they are sought to be exercised in the military. Rather, this Court has determined that limitations may be justified, notwithstanding the importance of the right, because of the special conditions of the military. *e.g., Brown v. Glines*, 444 U.S. 348, 354 (1980) ("The rights of military men [to free speech] must yield somewhat" to special demands required by military discipline); *Parker v. Levy*, 417 U.S. 733, 758 (1974)

interfere with the beliefs of a religious individual or group.' *Id.* at 11. The First Amendment, as an expression of this conviction, was not a fortuitous memorialization of a passing political philosophy, but a representation of a considered moral view - a moral view whose dimensions have deepened and broadened with the enriching experiences and thought of the past 200 years.

It is too late now for the government to argue that freedom of religious exercise is not a fundamental right. It is fundamental, not only in the sense of its being a legal entitlement to which, by reason of the First Amendment, an individual's claim is particularly clear, but also in the sense that such a basic right is a constitutive element of a free and enlightened society, an aspect of the individual dignity and freedom which form the premise of a free society. Because the right to religious exercise inheres in the individual, it can be no less fundamental to a member of the military than to a civilian. Put another way, the fact that free exercise rights are abridged in the military rather than in the civilian context should not affect the seriousness with which we view that

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(footnote 5 continued)

(members of military not excluded from protection of First Amendment but different character of military community requires different application); *see generally*, Zillman and Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on The Society Apart*, 51 *Notre Dame Lawyer* 396 (1976); Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing*, 18 Wayne L. Rev. 665 (1972). Though the practical consequence may in some cases be the same, it is important to recognize, because it leads to different doctrinal conclusions, that this Court's decisions upholding limitations on First Amendment rights in the military have relied on a theory for limiting fundamental rights and not upon the idea that such rights were not important or fundamental.

abridgment.[6] This is not to say that the special conditions of the military do not justify limitations on the exercise of religious freedom which would not withstand scrutiny if imposed in a civilian context. But the significance of the right, as a constitutional value, does not vary with the context.

As a matter of principle, a limitation on the exercise of a right could be upheld either because the right was not sufficiently important, or because, notwithstanding the importance of the right, the government's special interest in the limitation, as applied to restrict the exercise of the right, justified the limitation. The point of the above argument is that a limitation on the right of religious exercise could not be upheld on the theory that the right was not sufficiently important. The second possibility - that a special governmental interest might justify a limitation on the exercise of a right - is what strict scrutiny is all about.

This Court has recognized that, in the case of a fundamental right such as religious exercise, "[o]nly the gravest abuses, endangering paramount interests, give occasion for

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[6] The context may, of course, enter into the determination of whether certain rights exist in the first place. This Court has recognized for example, that free speech rights do not extend to non-public forums. *Perry Education Ass'n. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). The standard of review given to free speech claims in such cases is accordingly lower, and less than compelling reasons will justify restrictions on speech. The non-public forum cases do not deal with the legal justification necessary to sustain a withdrawal of (or limitation on) free speech rights, but rather with the very different question of whether it could be said, given the context, that those rights existed in the first place. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (holding that petitioner had no constitutional right to protest on jail grounds); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding civilians had no constitutional right to distribute leaflets on military property).

permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945). As elucidated by this Court, this means not only that the government must show that it has a compelling interest but also that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Thomas v. Review Board*, 450 U.S. at 707, 718; *Sherbert v. Verner*, 374 U.S. at 407.

(footnote 6 continued)

Some of these cases also raise the corollary inquiry whether government by its actions has opened a forum and thus obligated itself to extend free speech rights where none previously existed. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). If, however, the government opens what is otherwise not a public forum and thereby creates a sphere in which free speech rights exist, its regulation of speech in that "limited public forum" is subject to the same exacting scrutiny applicable to government regulation of speech in a public forum. *Id.* at 267-70. The principle deducible from these cases is that once a right to free speech exists, either because the right inheres in the forum or because government has created the right by opening a forum, it cannot be abridged apart from a compelling justification. For this reason, the elimination of a forum in which free speech rights inhere would require a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 56, 66 (1983) (Brennan, J., dissenting). Whether a given forum involves a truly non-public forum or the elimination of a forum as to which legitimate claims to speech rights may be made may be a difficult question.

It is, happily, not the kind of question presented by this case, for it is at least clear that the protections of the free exercise clause extend to members of the military as well as to civilians. The question in the military context is not the existence of a right, but the extent to which limitations on the exercise of that right may be justified. The appropriate framework for resolving that question is the strict scrutiny called for by this Court's decisions under the free exercise clause.

B. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW ELIDES THE LEAST RESTRICTIVE MEANS AND COMPELLING INTEREST STRANDS OF ANALYSIS REQUIRED AS PART OF THE STRICT SCRUTINY THIS COURT GIVES TO GOVERNMENT REGULATIONS ABRIDGING FUNDAMENTAL RIGHTS AND SUBSTITUTES IN THEIR STEAD A HYPOTHETICAL BALANCING INIMICAL TO THE THEORY OF BALANCING EMPLOYED BY THIS COURT.

The government's argument that deference should take the form of lower scrutiny must, therefore, be construed to be an argument that its interest in all but its most arbitary regulations is always compelling. As such, it would replace the case-by-case balancing called for by this Court's free exercise decisions with a hypothetical balancing in which the government's interest was considered in light of the universe of First Amendment rights that might be burdened by the government's regulations. Lower scrutiny is, in this sense, a rule representing the outcome of the government's hypothetical balancing: The government's interest in all but its most arbitrary regulations overbalances all potential First Amendment interests.

Such a hypothetical balancing is, however, plainly inconsistent with this Court's approach to fundamental rights. That approach seeks to confine balancing to those unusual cases involving the "gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. at 530, and thereby to permit the government only a modicum of flexibility in restricting such rights.[7] The government's hypothetical

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[7] *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) (discussing limited role of balancing in First Amendment analysis).

balancing has the opposite effect, creating a rule that reflects the balancing away of rights in all but the most extreme cases. *Id.* at 531 ("Where the line shall be placed in a particular application rests, not on . . . generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by a specific restriction . . .").

A more subtle effect of the government's wooden approach is to prevent consideration of whether the government's interest in not accommodating an individual by granting him an exemption was compelling. It would also foreclose analysis of the related question whether the government's regulation was the least restrictive means of accomplishing its interests. Yet in any case in which a truly significant governmental interest is set in conflict with a First Amendment right, these two related inquiries will always be more critical to pursue than the more general question whether the state's interest may be ranked with those "in the highest order." *See Wisconsin v. Yoder*, 406 U.S. at 215-16, 221-25.

An exemption, like a less restrictive means, has the potential for resolving both the government's and the individual's claims without compromising either. There may, of course, be a significant marginal cost to the government of granting an exemption or shifting to a less restrictive means. But that marginal cost will generally be less than the cost to the government of not accomplishing its interests. Analyzing the government's interest at the margin therefore minimizes, and to that extent eliminates, the putative conflict between the government and individual. Because such marginal analysis obviates, *pro tanto*, a final ranking of the government's interest (as compelling or not compelling), and the balancing that implies, such a ranking should always be subordinated to the evaluation of any potential exemption or less restrictive means.[8] *See United*

States v. Robel, 389 U.S. 258, 268 n.20 (1967) (avoiding determination of whether government's interest outweighed individual's First Amendment interest by focusing on availability of less drastic means.) The government's hypothetical balancing, therefore, forecloses pursuit of the most relevant inquiries.[9]

The government's argument for lower scrutiny thus amounts to a sweeping claim that its interest in military governance is so compelling that it could never tolerate any exemptions to accommodate religious freedom. "Where fundamental claims of religious freedom are at stake, however," this Court "cannot accept such a sweeping claim; despite its admitted validity in the generality of cases," this Court "must searchingly examine the interests that the state seeks to promote by its requirement . . . and the impediment to those obectives that would flow from recognizing [an] exemption." *Wisconsin v. Yoder,* 406 U.S. at 221. In short, the government's general proposition - that its interest is always compelling - cannot support the weight of the analysis its seeks to replace.

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[8]If the government is unwilling to shift to a less restrictive means or to grant an exemption, even though such adjustments would not prevent it from accomplishing its stated interest, it must be because the government's real interest is not in the ends allegedly sought to be attained but in the means itself. Indeed, the court below recognized that the government's interest in this case is in enforcement for its own sake and not in the particular requirements of the regulations. *Goldman v. Secretary of Defense*, 734 F.2d at 1534 ("That interest lies in the enforcement of regulations, not for the sake of the regulations themselves, but for the sake of enforcement.") But the claim that the government's interest is in enforcement for its own sake crudely resolves itself into a claim that the government's interest is in doing whatever it decides to do.

[9]*See* Tribe, *American Constitutional Law*, 855 (1978) ("In applying the least restrictive means alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying a

C. THE GOVERNMENT'S ARGUMENT FOR LIMITED JUDICIAL REVIEW MISPLACES THE ROLE OF DEFERENCE IN CONSTITUTIONAL ANALYSIS.

The government attempts to deflect analysis of its argument for limited judicial review by framing it in terms of the notion of deference. This Court's decisions make clear, however, that deference does not require this Court to assume that the government's interest overbalances the First Amendment interests or to forego analysis of whether the government has a less restrictive means at its disposal. In *United States v. Robel*, 389 U.S. 258 (1967), for example, this Court struck down a statute prohibiting employment of a member of a communist-action organization at a "defense facility" on the ground that there were other less drastic means available to Congress in achieving its goal of preserving the national defense. *Id.* at 265-68. Deference does not obviate scrutiny of means; on the contrary, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " *Id.* at 265 *quoting NAACP v. Button*, 372 U.S. 415, 438 (1963).

The deference required by the constitutional role of the military should affect the weight to be given to the particular interests asserted by the government in justification of its regulation. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (deference affects acceptance of specific judgments). It should not affect either the standard by which those claims are assessed or the requirement that the government's means be narrowly tailored to its goals. An assertion by the

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(footnote 9 continued)

religious exemption with the State's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest - that in denying an exemption - is constitutionally relevant when an exemption is sought.")

military that an interest was compelling might be accepted out of deference, for example, to the military's special competence in certain areas, even though a similar assertion in the civilian context would not. *Id.* (deference due to Congressional judgments regarding military operations and needs).

Nevertheless, deference does not require that even wholly implausible claims be accepted. *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973). This Court has the obligation to review the government's claims to determine which may, and which may not, properly be called compelling taking into account the deference due to military judgments. Deference thus does not mean that military regulations abridging free exercise rights need not be justified, but only that the justifications proffered must be evaluated in light of the recognition that the courts have limited competence in making military judgments. [10]

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[10] Because deference to the military is seen as resting at least in part on the military's claim to special competence in certain areas, the degree of deference that is appropriate may vary depending upon the type of claim the military is asserting and upon the conditions under which it is being asserted. *Compare Frontier v. Richardson*, 411 U.S. 677 (1973) (overturning sex-based distinction in quarters allowances and medical benefits available to members of military) *with Schlesinger v. Ballard*, 419 U.S. 498 (1975) (sustaining distinction between men and women based on participation in combat by men) *and Rostker v. Goldberg*, 453 U.S. 57 (1981) (sustaining sex-based distinction in draft registration requirement). *See also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 191-94 (1962). For example, a military judgment that troops be deployed on a certain day in a time of war would seem almost certainly to command greater deference than that due a general claim to expertise in military governance in a time of peace. Given the large percentage of society under military authority, the peace-time claims of the military to special competence in matters affecting fundamental rights should be viewed more narrowly. *Id.* at 187-88.

II.

The Military's Interest In Not Granting Petitioner An Exemption Is Not Compelling Even Taking Into Account the Deference Due to Specific Claims Made By the Military.

Deference to the military requires recognition that its interest in uniformity is substantial. It is unnecessary to consider, however, whether this interest could be ranked as "compelling," for the government must in any event show that exempting Petitioner would prevent it from realizing its interest in uniformity. Put another way, the government must show that its interest in preventing the marginal loss of uniformity represented by granting petitioner an exemption is compelling. *Wisconsin v. Yoder,* 406 U.S. at 221-25, (analyzing whether marginally better fulfillment of state's interests in education achieved by not granting exemption to Amish children from state's requirement of one or two years of additional school outweighed the religious exercise rights of the Amish). The government cites its own study for the proposition that "strict compliance with uniformity regulations" will "[break] down the barrier to discipline." *Goldman v. Secretary of Defense,* 734 F.2d at 1538-39. This is, however, no more than a restatement of the government's interest in uniformity in general.

The government must show, rather, why granting Petitioner an exemption would undermine the government's interest in uniformity in any significant way. It is in fact difficult to see how exempting Petitioner would have that effect. Indeed, it would be hard to reconcile such an assertion with the fact that Petitioner wore the yarmulke for several years prior to the event that precipitated this litigation. If the government's interest in not permitting such an exception is compelling, why was the government so dilatory in challenging Petitioner's *de facto* claim of exemption?

A distinction might be drawn between a *de facto* exemption, which arguably does not entail a formal challenge to military power, and an explicit exemption, which would require a public concession to a challenge to the uniformity policy. It thus might be argued that the government's critical interest is in assuring that the will of the military once asserted is obeyed. The danger of allowing an exemption would, in this view, flow not from the breach in uniformity *per se,* but from the breach of asserted authority. The trouble with this argument is that it proves both two much and too little.

On the one hand, it would undermine the basis for any effective judicial review of military decisions, because only when military authority were challenged would the problem of granting an exemption prove critical. In such case, protection would always be unavailable when needed. On the other hand, it would presumably mean that the military could establish a system for accommodating religious needs, because claims for exemption would then not represent challenges to military authority but acts of submission to it. This latter problem not only exposes the difficulty with this line of argument but also points toward the central problem with the military's justification for refusing an exemption: It is ultimately predicated on the view that the military can demand that the individual subordinate his will to its expressed will in every case.

That justification would leave no room for freedom of conscience. Indeed, freedom of conscience would be available only to the extent that military regulations allowed for it. To the extent that such regulations cut into freedom of conscience, the argument that the regulations abridged freedom of conscience in a wholly arbitrary manner would never be helpful, for the government could always respond that its interest was in the "enforcement of the regulations, not for the sake of the regulations themselves, but for the sake of enforcement." *Goldman v. Secretary of Defense,*

734 F.2d at 1540. There does not appear, therefore, to be any arguably legitimate, let alone compelling, reason for the government to refuse to grant Petitioner an exemption.

Perhaps for this reason, the government argues instead that it must consider "not the effect of a single exception but the cumulative effect of numerous exceptions that might be requested . . ." *Goldman v. Secretary of Defense,* 734 F.2d at 1539. But, as this Court has observed, "undifferentiated fear or apprehension of disturbance is not enough to overcome" fundamental rights. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969). The government's *de facto* grant of an exemption to Petitioner throughout the past several years has not led to such a problem and there is no reason to assume that granting him an explicit exemption will have that effect now. Nor is there any evidence in the record to suggest that it would. The likelihood that granting Petitioner an exemption would lead to numerous requests is not a problem peculiarly within the military's expertise.[11] Finally, the argument that one exemption will lead to numerous others, which will in turn destroy the system, is available in every free exercise case. But it is more a critique of the requirement of an exemption than it is an explanation of why one cannot be granted. This Court has rejected such arguments in the past and should do so now.

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[11]The possibility that granting an exemption, or several exemptions, would tend to vitiate the reflexive obedience which the government is seeking to *instill* is a military matter, if only because the military's judgment is based upon its experience in developing such obedience. For the reasons discussed above, however, this fear is simply not credible enough, even considering the deference due to the military, to overbalance Petitioner's religious freedom.

III.

The Government's Effort to Compel Petitioner to Violate His Religious Faith Strikes At the Core of Freedom of Religious Conscience And the Religious Liberty Interest Thereby Implicated Should Not Be Devalued Merely Because It Involves "Conduct" Rather Than "Belief."

The government's asserted interest for refusing to grant Petitioner an exemption would clearly have no merit in a civilian context. Even considering the deference due to the military, the military's asserted interest for refusing to grant an exemption is simply not compelling.[12] Yet to the extent that the military's interest is viewed as significant, the analysis inevitably leads to evaluation of the weight to be given to Petitioner's religious freedom claim. Once a case is put in this pure balancing posture, there is a need to break the deadlock by somehow ranking the individual's interest as more or less compelling than the government's interest.

The apparent alternative is to treat all religious claims that are able to pass an initial threshold, having to do with whether they fall within the scope of the free exercise clause, as undifferentiable. Analytic consideration would then be limited to whether the government's interest is compelling in

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[12]This may be why the government has sedulously sought to avoid the issue first by arguing that only limited judicial review (which would not require it to adduce a compelling interest for refusing exemption) is appropriate, and second by arguing that the problem is not a single exemption but the numerous requests which such an exemption might generate. The government thus seeks to erect a standard of review premised on its claim to unique competence as a general matter to shield its inability to defend that claim as applied to a specific case.

some absolute sense. But it is difficult to assess whether a particular interest is compelling without reference to the interest required to be subordinated. Moreover, attempting to evaluate such claims in the abstract may merely obscure an intuitive weighing process that is unavoidable.

The powerful urge to evaluate the substantiality of religious exercise claims appears in this Court's references to the distinction between conduct, which is regulable, and belief, which is not. The court below concluded that Petitioner's religious exercise involved conduct rather than belief. Although that court found that Petitioner's interest, thus characterized, raised "serious questions," the distinction between belief and conduct made it easier for the court to conclude that the "Air Force's reason [sic] for its rules . . . are sufficient answer." Employed in this manner, the belief/conduct dichotomy is gravely misleading because it relates awkwardly to what is evidently its noble purpose: To identify the core of freedom of conscience and to protect it absolutely.[13]

As this case illustrates, labelling a thing as "conduct" rather than "belief"[14]; does not establish that it is any more

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[13]The implicit trade-off in protecting core freedoms absolutely is to permit at least some regulation and restriction of penumbral freedoms. In the lower federal courts, the distinction appears frequently to be employed to devalue religious freedom claims. *See e.g., Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983); *Badoni v. Hagginson,* 638 F.2d 172 (10th Cir. 1980).

[14]There is, of course, the ontological problem of giving content to the distinction between belief and conduct. But the lower courts do not appear to have been troubled by such problems and have frequently found it convenient to label things as "conduct." *See e.g., Keller v. Gardner Community Consolidated Grade School District,* 552 F.Supp. 512, 514-515 (N.D. Ill. 1984) and, *United States v. Warner,* 595 F.Supp. 595, 597 (D.N.D. 1984). Because the purpose of the distinction is to

distanced from the core of freedom of conscience. The wearing of the yarmulke is, for Petitioner, no less a matter of conscience than stating his belief in God would be if required as a test for public office.[15] Both are absolutely required by his religion and one is not, as a matter of conscience, any "less required" than the other. To put it conversely, to coerce Petitioner into wearing Air Force headgear in lieu of his yarmulke would work, it is fair to say, as much torture on his conscience as would coercing him to deny some religious belief. For him, wearing the yarmulke is a matter of obedience to his religion, one that he has faithfully and fastidiously executed throughout his adult life. To coerce him into forsaking it now would cause him to violate his conscience on a fundamental level.

If the object of the distinction is to locate in the nature of the religious interest for which protection is sought some characteristic that will facilitate a qualititative comparision of the government's interest to the individual's, it is therefore not helpful to refer to the distinction between

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(footnote 14 continued)

enable a comparison of a substantial government interest with a religious interest with a view toward determining a clear-cut victor, the distinction may be central to the outcome of many cases. Indeed, it seems to offer a readily identifiable and principled resolution of what otherwise appears to be, at least in a close case, a problematic weighing process. If the distinction is in actuality an awkward abstraction of the notion that there are certain core aspects of freedom of conscience, its potential to mislead constitutional analysis is great.

[15] *See Torcaso v. Watkins,* 367 U.S. 488 (1961) (holding religious test for public office to be invalid under free exercise clause as infringement of belief); *McDaniel v. Paty,* 435 U.S. 618, 627 (1978) (construing restriction on religious freedom in *Torcaso* to be restriction on belief rather than conduct).

belief and conduct. The distinction between belief and conduct offers a convenient bright line, one that enables a dichotomous qualititative evaluation of religious exercise claims useful for purposes of ranking such claims as against substantial government interests. But the line thus drawn does not mark a division between claims relating to the core of religious conscience and those outside that core.

Whatever may be the precise boundaries of such a core, the compelled violation of religious faith at issue in this case surely must be within them. Consideration of whether government action compels a violation of religious faith is "the beginning, not the end, of [the] inquiry." *Sherbert v. Verner,* 374 U.S. at 403-04. Government action that compels a violation of an individual's religious faith imposes a direct burden on religion, as opposed to indirect burden occasioned by regulations that coerce (but do not compel) violation of religious faith through denial of a benefit.

This would be a different case if the government sought to prevent Petitioner from attaining promotions because of his insistence on wearing the yarmulke. Although that restriction would also violate the free exercise clause by imposing an unconstitutional condition upon the exercise of Petitioner's religious liberty, it would at least afford him freedom to choose to suffer the penalty. By contrast, the government here would afford him no choice. The religious liberty interest which Petitioner asks this Court to protect is, in this sense, a core freedom. If one were seeking a dichotomous evaluation of the religious interest in this case, Petitioner's religious liberty interest should, therefore, emerge from the analysis with a higher rather than a lower ranking.

The belief/conduct distinction contains within itself the potential to mislead constitutional analysis, as its use by lower courts would appear to demonstrate. This Court should refine the distinction to relate it more directly to freedom of conscience, or should disavow it entirely and

replace it with a direct inquiry into the effect of regulations on freedom of conscience. Regulation of belief should be unconstitutional regardless of how the test is framed.

The government's regulation would force Petitioner to violate his conscience as to a fundamental requirement of his religion. Such compelled violation of conscience is repugnant to the Constitution. The government has not adduced any compelling reasons for not granting Petitioner an exemption from its requirement. This Court should, therefore, require the government to grant him an exemption.

CONCLUSION

This Court should always require the government to identify compelling reasons for regulations abridging religious liberty. Religious liberty is a fundamental value, for members of the military as well as civilians. The special constitutional role of the military does suggest that in evaluating specific claims made by the government on military matters, this Court should be slow to substitute its judgment for the government's. It simply does not follow from this, however, that the government need not advance any compelling reasons for action abridging religious liberty. Nor does it follow that purely frivolous claims, or claims that are not significantly related to the military's special expertise, should automatically be considered compelling. This Court must carefully consider the government's claims, taking into account its lack of expertise in certain military matters, to determine first whether such claims merit deference, and second whether given such deference, they evince a compelling interest.

Analysis becomes, if anything, more important whenever it is necessary for this Court to defer to the government as to the legitimacy of certain judgments, for in such cases the

Court has less of an independent basis for assessing whether or not religious liberty is being unnecessarily burdened. The necessity of relying to some extent on the government's substantive judgment should make this Court more scrupulous in testing the government's rationale against the formal requirements of free exercise doctrine. In particular, this Court must require the government at least to assert a compelling reason for its regulation. Such analysis of the government's interest at the margin is firmly established as a strand of strict scrutiny analysis. *E.g., Wisconsin v. Yoder,* 406 U.S. at 215-16; *Shelton v. Tucker,* 364 U.S. at 488. The government's uniformity argument is seriously deficient, for reasons having little to do with military expertise, as an explanation for not granting Petitioner an exemption. It means, as the court below recognized, that the government's interest is actually in "enforcement for its own sake," *Goldman v. Secretary of Defense,* 734 F.2d 1531, 1537 (D.C. Cir. 1984). It thus resolves itself into the meaningless claim that the government's interest is in doing whatever it decides to do.

Petitioner has a fundamental right to the free exercise of his religion. This right should not be devalued merely because its expression involves conduct. This Court must, therefore, reject the specious reasons advanced by the government for restricting Petitioner's religious liberty and order the government to grant Petitioner an exemption.

The decision of the court below conflicts with the free exercise clause of the First Amendment. It is, therefore, essential that the conflict be resolved in favor of Petitioner.

Respectfully Submitted,

F. Tayton Dencer
Counsel of Record
John W. Whitehead
D. Kevin Ikenberry

The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Wendell R. Bird
William P. Hollberg
The Rutherford Institute
of Georgia
1750 Peachtree Rd., N.W.
Atlanta, Georgia 30309

Tony Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
First American Center
12th Floor
Nashville, Tennessee 37238

W. Charles Bundren
The Rutherford Institute
of Texas
4300 Interfirst One
Dallas, Texas 75202

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030